



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**

**CAUSE NUMBER 24 OF 2014**

**BETWEEN**

1. CHRISTOPHER OKWAKO
2. NICHOLAS K. MIRIRO
3. GLADYS K. KALAMA
4. JACINTA M. WAWERU
5. HENRY MWANGOLO
6. MARTHA KOMORA
7. META L. LOVA
8. PAUL K. CHENGO
9. ELVIS K. THOYA
10. FRANCO KADENGE
11. LILIAN M. CHARO
12. ELZINA KERUBO
13. EVANS M. CHARO
14. CARBORT GONA
15. DHAHABU KARISA
16. YAA JEPHA
17. OMARA IGWO
18. STEPHEN KALUME
19. PETER MURIMIH
20. BARNABAS KIEMA
21. KENNY IHA
22. BONIFACE MAINA

**VERSUS**

**SAI EDEN ROC HOTEL ..... RESPONDENT**

*Rika J*

**Court Assistant: Benjamin Kombe**

***Claimants in Person***

***Kinyua Muyaa & Company Advocates for the Respondent***

---

## ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

### AWARD

[Rule 27 [1] [a] of the Industrial Court Procedure Rules 2010]

1. The 22 Claimants are former Employees of the once popular Malindi Hotel, Sai Eden Roc Hotel. They were employed on diverse dates, working as Kitchen Stewards, Cooks, Senior Cooks, Barmen, Room Stewards, Waitresses, Gardeners, Sweepers, Cleaners, Pool Attendants, Chefs, Laundry Attendants, Accounts Clerks, Storekeepers, and Administrators. They entered employment on various dates, and earned different monthly rates of remuneration.

2. Their contracts were terminated prematurely on 17<sup>th</sup> December 2013 by the Respondent's Management. Termination, they state, was made after a fire gutted down part of the Hotel. They felt the decision by the Respondent was unfair and unlawful, and on 7<sup>th</sup> February 2014 filed a joint Statement of Claim in which they each seek the following terminal benefits and compensation from the Respondent:

- a. 1 month salary in lieu of notice;
- b. Leave and pro-rata leave;
- c. Leave allowance and pro-rata leave;
- d. Salary for the month of December 2013;
- e. Refund of 25 % of their salaries deducted by the Respondent on certain months during service;
- f. Other pending dues;
- g. Public holiday overtime pay;
- h. 12 months' salary in compensation for unfair termination; and
- i. 12 months' salary in damages for unfair termination

The total Claim is computed at Kshs. 9,620,473. The Claimants pray for costs, interest and any other suitable prayer the Court may deem fit to grant.

3. The Respondent filed its Statement of Response on 12<sup>th</sup> May 2014. It is conceded the Respondent is a Beach Hotel in Malindi, but denied that it has the legal capacity to be sued or to sue. The owners of the Respondent gave contracts to independent Management Companies for the period before and including 1<sup>st</sup> April 2012. The Claimants did not have contracts with the owners, and their claims cannot be sustained. Persons employed after the Hotel was taken over by new Management were all engaged on short term contracts, and were paid their dues in accordance with those contracts. There was a fire on 17<sup>th</sup> December 2013, which gutted down the Respondent's Kitchen, Administration Block, Restaurant and Reception. There were 55 Employees at the time, all on 3 month-contracts, which were to lapse on 31<sup>st</sup> December 2013. The employment records were gutted with the Administration Block.

4. The Employer and the Employees agreed the Employees be paid salary for the 17 days left in their contracts, and thereafter they would look for alternative employment, as the Respondent could not continue to employ them, until such a time as the Hotel was rehabilitated and able to conduct normal business. The Respondent would continue to pursue its claim with the Insuring Company, and follow the restoration of the business. No payment had been received by the Respondent from the Insurance Company, by the time this Claim was filed in Court. The Respondent concedes there was an arrangement for deduction of the Claimants' 25 % salary, which was agreed to between the Employer and the Employees, and which was supposed to keep the business afloat amidst poor performance in the hotel industry due to insecurity. This was reviewable and depending on improvement in the overall business performance, the Employees would receive monthly top-ups to compensate for the loss occasioned during the low seasons. These arrangements were by consensus, but unfortunately, the records were consumed in the inferno. The Respondent denies owing the Claimants the amount of Kshs. 9,620,473 or any other sums. The Claimants disclose no cause of action against the Respondent, and the Respondent prays the

Court to dismiss the Claim.

5. Although served with the Hearing Notice, the Respondent and its Advocates did not participate in the hearing, on the 13<sup>th</sup> November 2014. The Claimants proceeded *ex parte*. Christopher Okwako, Boniface Maina, Omara Igwo and Elzina Kerubo testified for themselves, and on behalf of the other Claimants. Hearing closed on 13<sup>th</sup> November 2014, and Award reserved for 18<sup>th</sup> December 2014.

6. These former Employees of Sai Eden Roc told the Court they were informed by the Respondent's Management, that because of the prevalent low seasons at the Hotel, they would only receive their full salaries if the Respondent's monthly revenue was Kshs. 7 million. They would be paid their salaries less 25%, if the revenue collection remained below Kshs. 7 million. According to the Employees some of them objected, there was no agreement, and deductions contravened Section 19{2} of the Employment Act 2007.

7. When the high season arrived the Respondent changed the target from a revenue collection of Kshs. 7 million, to Kshs. 8 million. It would climb to Kshs. 9 million and so on. The deduction of 25 % continued relentlessly.

8. The Claimants continued to work after the Hotel burnt down, up to 21<sup>st</sup> December 2013, when they were asked to leave and return later to collect their salaries for 17 days worked in December 2013. When they returned they were told to wait until the Respondent received its cheque from the Insurance Company. The Claimants reported the dispute to the County Labour Office in Kilifi. The Respondent maintained its intransigent position. It conceded however, to have slashed the Claimants' salaries, but not for the months' claimed by the Employees. The Hotel is currently under renovation.

9. The Claimants were told by the General Manager their dues would be paid when the Respondent was compensated by the Insurance Company. The Management told the Claimants they could not see and consult the Owner of the Hotel. They were told they would be dismissed if they continued to resist the 25 % pay deduction. Even the deducted pay reached the Claimants inconsistently. Employees were constantly intimidated.

10. The Hotel changed its name and style at various stages. It has been known as Eden Roc, Platinum Resort and Pride Inn, before becoming Sai Eden Roc. The Employees were not informed about the changes in Management. Some were not issued written contracts. They ask the Court to allow their Claim.

#### *The Court Finds and Awards:-*

11. The Claimants were employed by the Respondent on diverse dates as shown in the Statement of Claim. They worked continuously, under short term contracts, which were renewed consistently. Charles Okwako for instance was placed on a contract of 1 month by Pride Inn Hotels & Investments Limited [Eden Roc Hotel], from 1<sup>st</sup> January 2012, ending 31<sup>st</sup> January 2012. He worked as a Kitchen Steward. The contract was renewed on 1<sup>st</sup> April 2012, to end 30<sup>th</sup> June 2012. He continued in the same position. This time the Employer, from the letterhead in the written contract, is indicated plainly as Eden Roc Hotel. The last Employer is shown in this contract as Pride Inn Hotels. The same Employee was engaged in another contract for 3 months, beginning 1<sup>st</sup> July 2012 to 30<sup>th</sup> September 2012. The Employer is shown to be Sai Eden Roc Hotel. He last worked under another 3 month contract dating from 1<sup>st</sup> October 2013, to lapse 31<sup>st</sup> December 2013. The Employer is indicated as Sai Eden Roc Hotel. The address of all the entities under which the Employees worked is the same- P.O. Box 350 Malindi. The other Claimants have annexed to the Statement of Claim similar contracts, issued by the Respondent. Gladys Kalama worked as a Senior Cook, and was initially employed on a 3 month contract beginning 1<sup>st</sup> October 2010 by Platinum Resort and Spa of P.O. Box 350 Malindi.

12. The Respondent's claim that its Employee have sued the wrong entity, or a nonentity, has no merit. They have sued a known entity which employed them, under various names and styles. It would be asking

too much of the Employees, to demand that they should uncover the various legal and business forms assumed by the Respondent. Employers normally adopt multilayered legal and business formations, and Employees should not be hindered in enforcement of employment obligations, on the basis that the real character of the Employer is unknown. It is enough that the Employer is identifiable. In this case the Sai Eden Roc Hotel is a known business with a physical presence in Malindi, and with known Managers who dealt with the Claimants.

13. The Claimants worked continuously, were paid at the end of each month, and their contracts were renewed routinely. Barring any interruption in the operation of the business, they would have legitimately expected the renewal of their contracts, after 31<sup>st</sup> December 2013. They were to be treated as regular Employees and the full benefit of the Employment Act 2007, extended to them.

14. There were two problems, two common problems bedeviling the hotel industry in the Coast Region, which seem to have fundamentally affected the Employer's business and the ability of the Claimants to continue serving. One, the business performance was poor on certain occasions during which the Claimants were in employment. The Parties referred to low seasons, occasioned by volatile security situation in most of the Coast of Kenya. Tourists kept away from the region. The Parties agreed that Employees, rather than lose their jobs, would be paid their monthly salaries less 25%. They would be recompensed once business made a turn around. The Claimants say however that some of the Employees objected to this arrangement and were intimidated by the Employer if they persisted in their protestations.

15. According to the Claimants, and this is not contradicted by evidence, the Respondent advised that this position would be reviewed, recompense made, once the revenues rose to Kshs. 7 million in a month. The Respondent abused the arrangement. Even when revenue reached Kshs. 7, 8 or 9 million, the Claimants continued to have 25% of their salaries deducted. To compound the breach, the Respondent paid the Claimants inconsistently.

16. Employers and Employees may agree during times of business crises to have part of the Employees' salary deferred until the business improves. It becomes an acceptable alternative to lay-offs. Such arrangements must be in writing. It should not however be assumed that the Employees forfeit their deferred salaries for good, or that in assisting the business to reorganize and keep afloat, they accept review downwards, of their prevailing rates of monthly pay.

17. In this case the Respondent should have paid the Claimants the cumulative 25% deducted from their salaries each time the business improved. The Respondent did not do so. At the very least, the Respondent should have endeavoured to pay Employees their arrears of salary, once it was realized that as a result of the fire which occurred on 17<sup>th</sup> December 2013, the Employees could not continue in employment in the foreseeable future. The Employees were only offered salaries for 17 days worked in December 2013.

18. The second occurrence which affected the Employees' ability to continue serving was the fire which consumed Sai Eden Roc on 17<sup>th</sup> December 2013. A Business which was already performing poorly, and struggling to keep the Employees at work, was unfortunately debilitated by this fire.

19. It was not possible to continue employing the Claimants, at least not in the foreseeable future. From the Parties' Pleadings, and the evidence of the Claimants, it can be concluded that this event however, was an interruption in, and not a destruction of, the Business. The Respondent states under paragraph 6 of its Statement of Response that it was agreed the Claimants look for alternative means of self-sustenance, until such time as the Hotel would be restored. The Respondent in such a situation can hardly be said to have unfairly terminated the Claimants' contracts of employment; it merely was not possible for the Claimants to continue working and to its credit, the Respondent left the door of re-employment of the Claimants open. Parties separated through *force majeure*. The fire was a disruptive and unexpected event, affecting the Claimant's completion of their contracts to 31<sup>st</sup> December 2013, and their legitimate expectation for immediate renewal of the contracts.

**20. The Claimants have no reason, to seek 12 months' salary in compensation, little less a separate demand for 12 months' salary in general damages. These two claims are rejected.**

21. The Parties agree that the Respondent had insured its business against fire. Business Advisors emphasize the need for Businesses, to have Business Interruption Insurance. Surviving disasters for most Businesses depends on the Businesses' loss of income protection. Businesses must prepare for all hazards, insure revenue streams. The Parties agree that the Respondent had insured against fire, and promised the Employees their dues would be met once compensation from the insurance materialized. It is not clear if the Respondent received its insurance cheque, but the common evidence is that the Respondent is reconstructing its premises, one year after the fire. The Business should be up and running in the coming days. Settling of the Employees' dues should have been as much important to the Respondent, as is its reconstruction and reopening.

22. There is no firm offer made by the Respondent to re-employ the Claimants. The Claimants themselves did not express their wish in Court, for re-employment once the Hotel reopens. Parties appear to have moved on, and in the view of the Court, the relationship, up to 31<sup>st</sup> December 2013, should be treated as terminated, and the Employees paid their full terminal dues.

**23. 1 month salary in lieu of notice is merited and allowed for each Claimant. There is evidence the Claimants worked in December 2013, for 17 days. They shall be paid 17 days' salary for work performed in December 2013. The claim for refund of 25% in salary deductions for the months indicated in the Claim is allowed for each of the Claimant.**

**24. The Court was not availed sufficient material to support the claims for contract dues; leave and pro-rata leave; leave allowance and pro-rata leave; other pending dues; and public holidays. Some of the prayers such as contract dues, and pro-rate leave sought twice, were beyond the comprehension of the Court. As in the case of compensation and damages, these prayers are declined. Given the circumstances under which the Claimants left employment, orders for costs and interest would not be in interest of good industrial relations and are declined.**

*It is ordered:-*

- a. **Termination of the Claimants' contracts of employment was by force majeure, and not unfair as to warrant damages or compensation;**
- b. **Termination shall be treated as regular termination, with the effect that the Respondent shall, within 30 days of the delivery of this Award, pay to each of the 22 Claimants, the following;**
  - i. **1 month salary in lieu of notice;**
  - ii. **17 days' salary for work done in the month of December 2013;**
  - iii. **Refund of 25 % salary deductions over the period indicated in the Statement of Claim, for each Claimant;**
- c) **Other prayers are rejected.**

Dated and delivered at Mombasa this 18<sup>th</sup> day of December 2014

James Rika

Judge

